

No. 15393

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

DAVID DIAMOND, etc. and FREEDA DIAMOND, etc.,

Appellees.

APPELLEES' BRIEF.

GOSTIN & KATZ,

By IRWIN GOSTIN,

216 Hotel San Diego,

339 W. Broadway,

San Diego 1, California,

Attorneys for Appellee Freeda Diamond.

BROCK, FLEISCHMAN & RYKOFF,

By ROBERT L. BROCK,

1741 Ivar Street,

Hollywood 28, California,

Attorneys for Appellee David Diamond.

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MAY 24 1957

PAUL P. O'BRIEN, C

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APPELLEES' BRIEF.

Question Presented.

Whether the filing of affidavits of good cause during the course of the denaturalization trial, which affidavits were received into evidence over the objections of defendants' counsel, was a sufficient compliance with Section 340(a) of the Immigration and Nationality Act, 66 Stat. 260, 8 U. S. C. A. 1451(a) which requires the filing of an affidavit of good cause as a prerequisite to institution of denaturalization proceedings.

Summary of Argument.

Section 340(a) of the Immigration and Nationality Act provides that United States attorneys, upon affidavits showing good cause therefor, may institute proceedings for denaturalization. In *United States v. Zucca*, 351 U. S. 91 (1956), the Supreme Court held that the plain meaning of this statutory requirement was that the filing of the affidavit was a prerequisite to maintaining a denaturalization suit. In the instant case no affidavit of good cause was filed prior to trial, but appellant offered into evidence, during the course of the trial, the affidavits of good cause which allegedly were in its possession at the time the denaturalization suits were instituted.

The Complaints were properly dismissed because the statutory requirement was not met and rights of appellees were prejudiced because they had no opportunity to test the sufficiency of the affidavits, and because they were denied full opportunity to avail themselves of pre-trial discovery proceedings based upon information which would have been disclosed to them by the affidavits of good cause. Filing of the affidavits as exhibits after commencement of the trial did not satisfy the statutory requirements and did not mitigate the prejudice to appellees' rights.

ARGUMENT.

I.

The Omission of Appellant to File With the Complaints Affidavits Showing Good Cause Rendered the Complaints Fatally Defective.

Section 340(a) of the Immigration and Nationality Act, 66 Stat. 260, 8 U. S. C. A., Section 1451(a), provides in part:

“It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of Section 310 of this title . . .”

In *United States v. Zucca*, 351 U. S. 91, at page 94, the Supreme Court said:

“Were we obliged to rely solely on the wording of the statute, we would have no difficulty in reaching the conclusion that the filing of the affidavit is a prerequisite to maintaining a denaturalization suit.”

Again at page 95 of the *Zucca* case, the Court said:

“The natural meaning of the language used in Sec. 340(a) is that filing of the affidavit is a procedural prerequisite to maintenance of the suit.”

At page 99 of the *Zucca* case the Court said:

“This proceeding was concededly brought under Sec. 340(a). We hold that this is the only Section under which a United States attorney may institute denaturalization proceedings, and that the affidavit showing good cause is a procedural prerequisite to the maintenance of proceedings thereunder.”

In concluding the *Zucca* decision the Court said at page 100:

“We believe that, not only in some cases but in all cases, the District Attorney must, as a prerequisite to the initiation of such proceedings, file an affidavit showing good cause.”

In view of the clear language of the Statute and the even clearer language of the *Zucca* decision, the appellant now contends that “prerequisite to the initiation of such proceedings” means “post-requisite” to the initiation of denaturalization proceedings.

The affidavits filed in the instant case did not comply with the statutory requirement; the “prerequisite” has not been met; therefore, whether the requirement of the filing of the affidavits be considered jurisdictional or procedural, the complaints were properly dismissed.

II.

Appellant's Failure to Comply With Prerequisites of Maintaining the Action Could Not Be, and Was Not Thereafter Cured or Waived.

Appellant apparently argues that since the requirement of affidavits showing good cause are procedural and not jurisdictional the requirement could be waived, or the failure to file an affidavit showing good cause at the commencement of the action could later be cured. This argument implies that appellant feels that the complaints should at least be dismissed conditionally—until a proper affidavit is filed giving appellees sufficient time to test its sufficiency. This, however, was not done and, therefore,

even under appellant's own reasoning the failure to file the affidavit was not at any time cured.*

It may also be said, however, that appellees at no time waived their rights regarding the filing of an affidavit showing good cause and, prior to trial, moved the Court to dismiss the complaints on the ground that the Court did not have jurisdiction over the actions because the complaints were not supported by affidavits showing good cause [R. 14, 22]. Further, when the affidavits showing good cause were received into evidence, it was over the objections of defendants [R. 123-127].

Appellees' motion to strike the affidavits [R. 239] was never ruled upon by the Court. Clearly, appellees never waived appellant's failure to timely file the affidavits.

III.

Appellant's Failure to File Affidavits at the Commencement of the Actions Prejudiced Rights of Appellees.

"The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provided that a person, once admitted to American citi-

*The District Court in the *Zucca* case, 125 Fed. Supp. 551, originally ordered "the complaint dismissed unless the Government filed an affidavit showing good cause within 60 days." (351 U. S. at pp. 91, 92.) The affidavit was not filed and the complaint was dismissed *unconditionally*, but without prejudice to the Government to file a new action properly. It was the order of the district court which dismissed the complaint unconditionally but without prejudice that was affirmed by the Supreme Court. (351 U. S. at p. 94.)

zenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause. Such a safeguard must not be lightly regarded.”

United States v. Zucca, 351 U. S. 91, 99.

“The complaint, under modern practice, is required merely to allege ultimate facts while the affidavit must set forth evidentiary matters showing good cause for cancellation of citizenship.”

United States v. Zucca, 351 U. S. 91, 98.

See also:

United States v. Salomon, 231 Fed. 928 (C. A. 5th, 1916);

United States v. Richmond, 17 F. 2d 28 (C. A. 3rd, 1927).

Not only did Congress intend that denaturalization suits should not freely be instituted without a preliminary showing of good cause, but it also contemplated that defendants in such cases should have the right to test the sufficiency of affidavits which would be used as the basis of denaturalization suits.

“. . . But the protection afforded by the requirement of an affidavit of good cause would be seriously impaired if the defendant in a denaturalization action could not examine it and test its sufficiency by motion before trial. (*United States v. Zucca*, 125 Fed. Supp. 551, 556.) We think it manifest that it was intended that the required affidavit should state facts constituting ‘good cause’ for instituting the proceedings and should do more than point out errors of law in the procedure which led up to denaturalization. (*United States v. Salomon*, 231 Fed. 928, 930 (C. A. 5th, 1916).) To require the filing of evidential affidavits

implies, as Zucca contends, extensive testing of their sufficiency before trial. The defendant is thus given two chances at the Government's case."

United States v. Zucca, dissenting opinion at page 103.

Having been denied the right to test the sufficiency of the affidavit prior to trial, appellees were subjected to suit without any preliminary showing by appellant that appellees' certificates of citizenship might properly have been denied at the time they were granted. The requirements of the affidavit of good cause have long been recognized as the safeguard against this procedure. In *United States v. Salomon*, 231 Fed. 928 at page 930, and in *United States v. Richmond*, 17 F. 2d 28 at page 30, the Courts said:

"The conclusion is that the statutory remedy [of denaturalization] would be perverted from its obvious purpose of safeguarding things of substance, if it is permitted to be successfully resorted to, without any showing that the issue of the attacked certificate of citizenship might properly have been denied at the time it was granted . . ."

Since the purpose of the requirement of an affidavit is to provide a preliminary showing of good cause and to afford defendants in denaturalization suits the opportunity to test the sufficiency of the affidavits prior to trial, appellant's theory that the affidavits may be filed at any time renders the affidavit requirement meaningless and makes the *Zucca* decision a nullity. The affidavit is required as a prerequisite to suit to protect the government "while safeguarding citizenship from abrogation except by a clearly defined procedure . . ." (*Bindczyck v. Finucane*, 342 U. S. 76, 83.) Citizenship cannot be safeguarded if naturalized citizens are deprived of the exercise of

the rights enacted for their protection by the whim of the government. The Department of Justice memorandum which is quoted by the Supreme Court in a footnote at page 97 of the *Zucca* decision states that “. . . the defendant can probably obtain most of the government’s evidence by a proper utilization of the methods of discovery provided in Rules 16, 33 and 34.” Apparently affidavits were not attached to the complaints in the instant cases in order to “reduce the ordinary chance of discovery rules being employed . . .” (Circular No. 3663, Department of Justice, Supp. No. 9, April 6, 1943, p. 87.) Of this practice the Supreme Court took a dim view, stating that:

“We think that the public interest is not served by taking such liberties with a specific statutory requirement designed for the protection of naturalized citizens.”

United States v. Zucca, 351 U. S. 91, 98.

Having been deprived of their rights to test the sufficiency of the affidavits prior to trial and to make use of the information which would have been supplied to them by the affidavits, appellees also were deprived of effective use of discovery proceedings and, therefore, were deprived of a fair trial on the merits of the action. To argue, as appellant does in its brief at page 12, that “any defect arising from appellant’s omission to file affidavits showing good cause with the complaints was cured by receipt of the affidavits in evidence, . . . and by evidence produced by the Government during the trial” is tantamount to suggesting that where statutory and Constitutional rights admittedly have been violated in the gathering of evidence, *e.g.*, by an illegal search and seizure, the “defect” is nevertheless “cured” by introduction of evidence obtained in such a manner during the course of the

trial. Citations to cases should not be necessary to underscore this point of deprivation of due process.

Further, to agree with appellant's contention that the affidavits may be filed at any time is to ignore the significance of a related portion of Section 340 which was enacted for the protection of naturalized citizens, and would create administrative problems for the courts. In addition to the affidavit requirement, Section 340, in paragraph (b), provides that defendants shall have 60 days to answer the Government's complaint. This provision contemplates that defendants should have a like time to examine the affidavit; if the affidavit does not accompany the complaint it may be necessary to suspend court proceedings for 60 days while defendants examine the affidavits. The examination may lead to discovery proceedings, motions and hearings—all of which should properly precede the filing of the answer by defendants. Appellees were denied 60 days to examine the affidavit and complaint; they were not served with copies of the affidavits until the second day of trial; therefore they were not granted the statutory time in which to answer the complaint.

Appellant makes an effort to distinguish the cases at bar from the *Zucca* case by stating that in the instant case affidavits showing good cause were in the possession of the United States Attorney when suit was instituted, while in *Zucca* there was no showing that an affidavit was even in existence. (Br. p. 10.) The *Zucca* case, however, shows that possession of the affidavit by the United States Attorney is not sufficient compliance with the statute. "We believe that, not only in some cases but in all cases the District Attorney must, as a prerequisite to the initiation of such proceedings, file an Affidavit Showing Good Cause." (*United States v. Zucca*, 351 U. S. 91, 100.)

This language makes it clear that it is the United States Attorney for each district who must file the Affidavit Showing Good Cause, and as this was not done in the instant case, the Complaints were properly dismissed.

Appellant cites several District Court cases, decided subsequent to *Zucca*, where late filings of affidavits were permitted or motions to dismiss because the affidavits were not filed with the complaints were denied. Appellees believe said cases to be clearly erroneous in that they are directly contrary to the language and decision of the Supreme Court in *Zucca*. It may be observed, however, that even in these cases the affidavits were filed *prior* to trial, thus giving defendants in those cases some opportunity to test their sufficiency and to make use of the information contained therein for discovery proceedings. Other courts have decided in accordance with *Zucca* and have dismissed complaints filed without the affidavit. (*United States v. Lucchese*, Civil No. 13052 (E. D. N. Y., now pending an appeal before the United States Court of Appeals for the Second Circuit), and *United States v. Sweet*, Civil No. 13349 (E. D. Mich., decided March 29, 1957).)

Conclusion.

For the reasons stated above it is respectfully submitted that the Order of the District Court dismissing the Complaints should be affirmed.

Respectfully submitted,

GOSTIN & KATZ,

By IRWIN GOSTIN,

BROCK, FLEISCHMAN & RYKOFF,

By ROBERT L. BROCK,

Attorneys for Appellees.